

contractor; which **party** bears the burden of showing the absence of prior express permission; and statutory damages. LPC argued that **the** EBR issues were individualized and extensive, considering its relationships with large numbers of past and present employees, vendors, tenants and prospective tenants; **determining** whether such prior established businesses relationships **were** sufficient to give rise to **an inference** of implied permission would surely be **an** extensive individualized undertaking. However, **as** the Court has indicated, the statute does not encompass implied permission. Accordingly, the nature of LPC's prior dealings **with** all those individuals is irrelevant **to** the causes of action before the Court and does not cause individualized issues to predominate over common issues. Although the question of express permission is individualized, it should be relatively easy to ascertain whether any class member did give prior express permission to LPC or ABF; moreover, the record suggests that the number of such persons is relatively small. Accordingly, the Court finds that common questions predominate over individual questions.

Rule 42(b)(4) also directs the court to consider whether the class action vehicle is superior, **and** in that context, to consider: (a) the interest of members in controlling separate actions, (b) pending litigation, (c) desirability of the forum; **and** (d) management. Here, there is no indication that anyone other than class counsel has any desire to control the prosecution of this action; absent a class action it appears unlikely that any individual claims would be asserted. There is not any other pending litigation regarding the subject matter **of** this lawsuit. Although this forum is not especially better than any other forum,

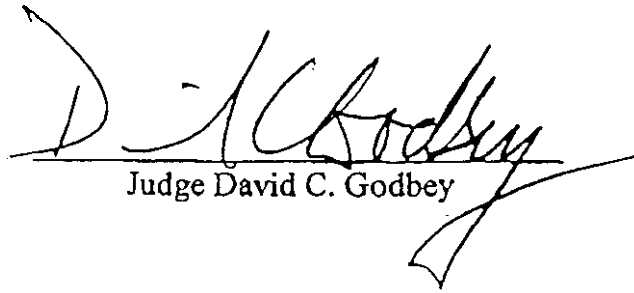
it does ~~seem~~ desirable for all this litigation to be in a single forum rather ~~than~~ scattered about **various** courtrooms throughout **Dallas** County and North Texas.

Finally, the Court considers management of the case and how it would proceed if certified. It ~~seems~~ likely that most issues would be resolved by summary judgment. The underlying facts regarding how the faxes **were** sent are not in dispute **and are** common to all potential class members; individualized proof need not be presented by plaintiffs. Damages ~~are set~~ by statute and need not be individually proved. Although ~~the~~ existence of express permission is an individualized question, applying the statute as written to consider only express prior permission limits the scope of that inquiry considerably and it can probably be resolved by summary judgment. Likewise, LPC has indicated it will proceed with a motion for *summary* judgment on some of its legal defenses, and it is certainly possible that motion may resolve plaintiffs' claims against LPC on a wholesale basis. In short, the case appears manageable if certified and a trial, if necessary at all, would not involve any extensive individualized proof. The court finds, based on consideration of all of these factors, that common issues predominate and that the class action vehicle is superior, and therefore certifies as a class action the TCPA claims brought on behalf of confirmed recipients of LPC faxes.

With regard to the proposed sub-classes involving individuals for whom receipt confirmation does not exist and all the claims of negligence, the Court further finds that the individualized questions raised by those persons and claims predominate over

common questions and **tip** the balance against class certification. Plaintiffs' request for certification of those **sub-classes** and claims is ~~therefore~~ denied.

SIGNED this ~~12th~~ day of **July**, 2001.



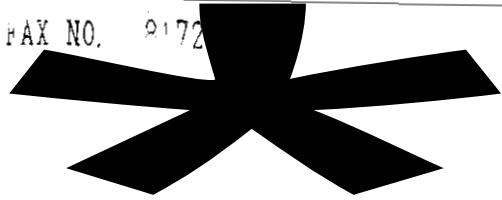
Judge David C. Godbey

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SIGNED this the 10 day of **April**, 2002.


JUDGE PRESIDING

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SIGNED this the 4 day of ^{November}~~August~~, 2002.

